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Ong Kwee Lee v Able Perfect Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-2083–11 OF 2022
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
14 JANUARY 2025

C

Trusts and trustees — Express trust — Certainties — Whether certainties of intention, subject-matter and object were present for creation of private express trust — Whether High Court erred in applying law relating to implied trusts and holding that there was no trust as appellant had not fully paid for his shares — Whether trust deed expressly declared that appellant was beneficial owner until such time respondent transferred the shares to him after purchase price of shares was fully paid — Whether apart from the shares itself, respondent also held dividends accruing on the shares on trust for appellant

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The appellant and his business partner agreed to use the respondent as a vehicle to acquire 500,000 shares worth RM18.75m in a company. The appellant contributed RM500,000 in cash towards the acquisition whilst the respondent raised the balance purchase price by taking out a bank loan for the purpose. Upon acquiring all the 500,000 shares in its name on 11 April 2016, the respondent, on the same day, entered into a trust deed with the appellant declaring, inter alia, that: (a) both parties had jointly acquired the 500,000 shares in equal proportion; (b) the appellant beneficially owned 250,000 of the said shares ('the trust shares'); (c) the respondent held the trust shares and all rights, title and benefits accruing thereto on trust for the appellant absolutely; (d) the parties were to equally share the cost of acquiring the shares; (e) upon the respondent's demand, the appellant shall immediately pay the acquisition and financing costs for the trust shares; and (f) the trust shares shall be transferred to the appellant and/or his nominee upon full settlement of the said acquisition costs. In a suit brought by the respondent against the appellant over the trust deed, the High Court held that: (i) the respondent did not hold the trust shares on trust for the appellant as he had not fully paid for their purchase and, therefore, was not their beneficial owner; (ii) the appellant's promise to pay the acquisition costs in future could not make him an immediate beneficial owner; and (iii) the respondent had merely reserved the trust shares for eventual transfer to the appellant after he had fully paid their purchase price and that until such time the transfer was perfected, the appellant had no right to any dividends declared on the shares. The instant appeal was against the High Court's decision.

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Held, allowing the appeal, setting aside the High Court's decision and ordering

the appellant to pay to the respondent within one month the sum of RM3,563,521.68 (as at 22 June 2022) together with interest thereon at 5%pa from that date until date of full settlement, being the balance amount he owed the respondent for acquisition of the trust shares:

(1) The trust in the instant case was a private express trust created by expressed intention and in writing and came into effect immediately upon the execution of the trust deed on 11 April 2016. It was not an implied trust created by inference drawn from the facts between the parties. The three certainties of intention, subject-matter and object were clearly present in the instant case for the creation of a private express trust (see paras 13, 16 & 21).

(2) The High Court erred in applying the principle of law of an implied trust and holding that the appellant could only be said to be the beneficial owner if he had made full payment of the purchase price of the trust shares (see para 18).

(3) Although ownership of the trust shares was to be transferred to the appellant upon full settlement of their purchase price, it was not the intention of the parties from the outset that the respondent was to sell the said shares to the appellant. Instead, it was agreed that the respondent would acquire the 500,000 shares and then hold 250,000 of those shares on behalf of and on trust for the appellant. The assumption that the appellant was the beneficial owner of the trust shares was immediate and was not conditional upon full payment of their acquisition costs (see para 20).

(4) It was clear from the wording in the trust deed that the respondent not only held the 250,000 shares on trust for the appellant but also held the dividends declared on those shares on trust for the appellant. Although the trust deed did not instruct the respondent on how it was to deal with the dividends, the respondent's using of the dividends to offset the appellant's purchase price for the trust shares was indeed for the appellant's sole and absolute benefit (see paras 27, 29–30 & 43).

(5) The trust deed gave the respondent the right, as creditor, to demand from the appellant immediate payment of the acquisition costs of the trust shares. As at 22 June 2022, the final balance owing by the appellant towards payment of the acquisition costs was RM3,563,521.68 (see paras 32–38).

[Bahasa Malaysia summary

Perayu dan rakan kongsi perniagaannya telah bersetuju untuk menggunakan responden sebagai kenderaan bagi tujuan pengambilalihan sebanyak 500,000 unit saham bernilai RM18.75 juta dalam sebuah syarikat. Perayu telah menyumbangkan sejumlah RM500,000 secara tunai bagi tujuan

pengambilalihan tersebut, manakala baki harga belian telah dibiayai oleh responden melalui pinjaman bank yang diambil khusus untuk tujuan tersebut. Setelah kesemua 500,000 saham tersebut diperoleh atas nama responden pada 11 April 2016, responden, pada hari yang sama, telah menandatangani satu surat akuan amanah dengan perayu yang, antara lain, memperuntukkan bahawa: (a) kedua-dua pihak telah bersama-sama memperoleh 500,000 saham tersebut secara sama rata; (b) perayu adalah pemilik benefisial kepada 250,000 saham tersebut ('saham amanah'); (c) responden memegang saham amanah tersebut serta segala hak, kepentingan dan manfaat yang berkaitan dengannya secara amanah bagi pihak perayu secara mutlak; (d) kedua-dua pihak bertanggungjawab secara bersama untuk menanggung kos pengambilalihan saham tersebut; (e) apabila diminta oleh responden, perayu hendaklah serta-merta membayar kos pengambilalihan dan pembiayaan yang berkaitan dengan saham amanah; dan (f) saham amanah hendaklah dipindahkan kepada perayu dan/atau penamanya setelah semua kos pengambilalihan tersebut dilangsaikan sepenuhnya. Dalam suatu tindakan yang difailkan oleh responden terhadap perayu berhubung surat akuan amanah tersebut, Mahkamah Tinggi telah memutuskan bahawa: (i) responden tidak memegang saham amanah tersebut secara amanah bagi pihak perayu memandangkan dia belum melunaskan sepenuhnya bayaran bagi pembelian saham-saham tersebut dan, oleh itu, bukanlah pemilik benefisial kepada saham-saham berkenaan; (ii) janji perayu untuk membayar kos pengambilalihan pada masa akan datang tidak menjadikannya pemilik benefisial serta-merta; dan (iii) responden hanya memperuntukkan saham amanah tersebut untuk dipindah milik kepada perayu pada masa hadapan setelah bayaran pembelian dilangsaikan sepenuhnya, dan sehingga pemindahan itu disempurnakan, perayu tidak mempunyai sebarang hak terhadap dividen yang diisytiharkan ke atas saham-saham tersebut. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi tersebut.

Diputuskan, membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan memerintahkan perayu membayar kepada responden dalam tempoh satu bulan jumlah RM3,563,521.68 (setakat 22 Jun 2022) berserta faedah ke atasnya pada kadar 5% setahun dari tarikh itu sehingga tarikh penyelesaian penuh, iaitu jumlah baki yang terhutang kepada responden untuk pengambilan saham amanah:

(1) Amanah dalam kes semasa merupakan suatu amanah nyata persendirian yang dibuat melalui hasrat yang dinyatakan secara jelas dan bertulis, serta berkuat kuasa serta-merta sebaik sahaja surat akuan amanah ditandatangani pada 11 April 2016. Ia bukanlah suatu amanah tersirat yang diwujudkan melalui inferens atau kesimpulan daripada fakta-fakta antara pihak-pihak. Ketiga-tiga kepastian niat, subjek amanah dan tujuan adalah jelas wujud dalam kes semasa bagi tujuan penubuhan suatu amanah nyata persendirian (lihat perenggan 13, 16 & 21).

(2) Mahkamah Tinggi telah terkhilaf dalam menggunapakai prinsip undang-undang berkenaan amanah tersirat dan memutuskan bahawa perayu hanya boleh dianggap sebagai pemilik benefisial sekiranya beliau telah menjelaskan sepenuhnya harga belian saham amanah tersebut (lihat perenggan 18).

(3) Walaupun pemilikan saham amanah tersebut hanya akan dipindahkan kepada perayu selepas pembayaran penuh harga belian, ia bukanlah menjadi niat pihak-pihak sejak awal bahawa responden akan menjual saham tersebut kepada perayu. Sebaliknya, ia telah dipersetujui bahawa responden akan memperoleh 500,000 saham tersebut dan seterusnya memegang 250,000 daripadanya bagi pihak dan atas amanah untuk perayu. Anggapan bahawa perayu adalah pemilik benefisial kepada saham amanah tersebut secara serta-merta dan tidak bersyarat kepada pembayaran penuh kos pengambilalihan saham berkenaan (lihat perenggan 20).

(4) Ia adalah jelas daripada peruntukan dalam surat akuan amanah bahawa responden bukan sahaja memegang 250,000 saham tersebut secara amanah bagi pihak perayu, malah turut memegang dividen-dividen yang diisytiharkan ke atas saham-saham tersebut secara amanah bagi pihak perayu. Walaupun surat akuan amanah tidak memperuntukkan secara khusus bagaimana responden harus menguruskan dividen-dividen tersebut, tindakan responden menggunakan dividen tersebut untuk mengimbangi harga belian saham amanah oleh perayu adalah sememangnya demi manfaat mutlak dan eksklusif perayu (lihat perenggan 27, 29–30 & 43).

(5) Surat akuan amanah memberikan hak kepada responden, selaku pemiutang, untuk menuntut daripada perayu bayaran serta-merta bagi kos pengambilalihan saham amanah. Sehingga 22 Jun 2022, baki akhir yang masih terhutang oleh perayu bagi pembayaran kos pengambilalihan tersebut adalah sebanyak RM3,563,521.68 (lihat perenggan 32–38).]

Cases referred to

Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (refd)

Legislation referred to

Trustee Act 1949

Appeal from: *Able Perfect Sdn Bhd v Ong Kwee Lee* [2023] MLJU 3367 (High Court, Shah Alam)

Cyrus Das (with Lau Kee Sern and Leong Xin Wen) (Kee Sern, Siu & Huey) for the appellant.
Harjinder Singh a/l Saudagar Singh (with Leong Yeng Kong and Chia Zong You)

(Leong Yeng Kit & Co) for the respondent.

Choo Kah Sing JCA:

INTRODUCTION

[1] The bone of contention in this appeal is whether the appellant was a beneficiary of 250,000 shares of a company known as Sekoplas Industries Sdn Bhd ('the said shares'), and whether the appellant was in breach of a trust deed dated 11 April 2016 ('the trust deed') in regard to the mode of payment towards the acquisition of the said shares which were registered in the name of the respondent, and whether the appellant was entitled to enjoy the benefit of the dividends to the said shares immediately despite not having paid the full amount of his portion of the shared acquisition costs to the respondent.

[2] The respondent contended that it was entitled under the trust deed to demand from the appellant the shared acquisition costs for the said shares together with interest, whereas the appellant in his counterclaim contended that his payment for the shared acquisition costs was by way of offsetting his entitlement to the dividends declared from the said shares, and that the dividends received would be used to offset the amount owing to the respondent for the acquisition of the said shares. In essence, the appellant's counterclaim sought for immediate benefit and entitlement of the dividends accrued from time to time despite the appellant not having paid in full his part of the shared acquisition costs (including the purchase price) of the said shares.

[3] The High Court found in favour of the respondent, and did not accept that the parties had created a trust for the said shares in that the respondent was holding on trust the said shares for the benefit of the appellant. Consequently, the High Court dismissed the appellant's counterclaim. Dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal.

BRIEF FACTS

[4] The appellant, Ong Kwee Lee, and one Ng Keng Hoe were friends and business partners. In early 2016, they agreed to jointly acquire 500,000 shares of the company Sekoplas Industries Sdn Bhd, and each would be entitled to 250,000 shares. The purchase price for the 500,000 shares was RM18.75m. The appellant could not come up with his portion (50%) of the purchase price of the 500,000 shares. They then decided to use the respondent company as the vehicle to acquire all the 500,000 shares.

[5] The appellant contributed cash RM500,000, and the respondent contributed the entire balance purchase price, including other costs incidental

to the acquisition of the 500,000 shares. The respondent took out a term loan to finance the purchase of the 500,000 shares from a local bank. The appellant and the respondent (through Ng Keng Hoe) agreed that the 500,000 shares would be used as security (by way of a charge) for the term loan.

[6] In addition to the shares being the security for the loan, the respondent also provided a third party charge of a property which belonged to Ng Keng Hoe's wife, and further provided a personal joint and several guarantee executed by Ng Keng Hoe and the wife in favour of the local bank. The loan was a term loan over a repayment period of seven years by way of monthly instalments. The acquisition of the 500,000 shares was completed on 11 April 2016. On the same day, 11 April 2016, the appellant and respondent entered into the trust deed. The salient terms of the trust deed read as follows:

> Whereas
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> A. The Trustee [the respondent] is presently the registered owner of 500,000 ordinary shares of RM1.00 each, representing 50% of the issued and paid-up share capital ('Total Shares') of *SEKOPLAS INDUSTRIES SDN BHD* (*Company No. 92720-W*), a private limited company incorporated in Malaysia and having its registered address at Suit 1603, 16th Floor, Wisma Lim Foo Yong, No. 86, Jalan Raja Chulan, 50200 Kuala Lumpur ('Company').
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> B. The Total Shares were acquired at a price of RM18,750,000.00 via the Share Acquisition Agreement dated 28 January 2016, and partly financed by a loan granted to the Trustee by Hong Leong Bank Berhad of RM15 million.
>
> C. The Trustee hereby acknowledges and confirms that the Total Shares were acquired jointly with the Beneficiary [the appellant] in equal share, and therefore half portion of the Total Shares comprising 250,000 ordinary shares of RM1.00 each representing 25% of the issued and paid-up share capital of the Company ("Trust Shares") beneficially belong to the Beneficiary, and the Trustee shall hold the Trust Shares and all the rights, title and benefits thereto on trust for the Beneficiary.
>
> *NOW THIS DEED WITNESSES AS FOLLOWS*:
>
> 1. The Trustee hereby irrevocably declares and confirms that as from the date the Trustee acquired the Trust Shares, it has been holding and shall continue to hold the Trust Shares with all rights, title and benefits thereto as Trustee, not for its own benefits, but upon trust for the sole and absolute benefit of the Beneficiary. Notwithstanding the aforesaid, the Beneficiary hereby acknowledges and agrees that the Trust Shares are charged to Hong Leong Bank Berhad as security for the financing obtained.
>
> 2. The Beneficiary hereby covenants and undertakes to bear the acquisition price and all ancillary costs thereof (including financing costs) in equal share with the Trustee, and hereby irrevocably undertakes to indemnify and keep the Trustee fully indemnified against all damages, claims, costs and expenses in connection with the Trust Shares. The Beneficiary shall upon a request or demand being made by the Trustee, promptly and

immediately contribute his portion of liabilities towards payment of the acquisition costs and financing obligations associated with the Trust Shares.

3. The Trustee shall cause the Trust Shares to be transferred to the Beneficiary and/or his nominee as and when requested to do so by the Beneficiary, subject to full settlement of all liabilities attributable to the Trust Shares by the Beneficiary.

4. The parties hereto mutually agree that the Trustee shall enter into a Shareholders Agreement with the other shareholder(s) of the Company in connection with the Total Shares, and both the Trustee and the Beneficiary shall each nominate a representative to be appointed as director of the Company to represent the respective interest of the parties hereto, and the Trustee shall exercise all the rights under the Shareholders Agreement in consultation of the Beneficiary. Whereas in relation to the Trust Shares, the Beneficiary irrevocably undertakes to indemnify and keep the Trustee fully indemnified against all damages, claims, cost and expenses in connection with the Shareholders Agreement.

5. Save as stated herein, the Trustee shall not at any time prior to the transfer in accordance to Clause 2 above, sell transfer dispose of charge mortgage pledge lease let assign transfer dispose off or mortgage the Trust Shares without the Beneficiary's prior written consent and shall deal with the same only in such manner as directed by the Beneficiary.

6. ...

7. ...

8. ...

9. ...

The findings of the High Court

[7] In essence, the finding of the learned High Court judge is encapsulated in para 71 of Her Ladyship's judgement which reads as follows:

> 71. Quite pertinently, the defendant (appellant) himself admitted that these shares were not gifts from the plaintiff (respondent). In fact, the trust deed quite clearly laid down what the defendant was required to do in order to gain ownership of the 250,000 Sekoplas Shares. In my considered view cll 2 and 3 provide clear duties and obligations on the part of both parties. Both clauses when read together bear the meaning that the shares must be paid for before the defendant has any sort of right to it. The defendant has not shown evidence of actual payment save for the initial payment of RM500,000 in January 2016. As such the trust deed could only be viewed as acknowledging and affirming the defendant's interest in the 250,000 Sekoplas Shares subject always to the full payment of the acquisition cost. Such an interest cannot be equated or elevated to the status of an immediate beneficial ownership status. There is no evidence that parties had intended to declare a trust.

[8] In para 74, Her Ladyship further stated as follows:

> 74. ... In order to be considered a beneficial owner the defendant must be able to prove that he had performed his contractual obligation upon full settlement of the purchase price before there the plaintiff can be said to be holding the shares as a trustee for him.

[9] In para 78, Her Ladyship has also stated as follows:

> 78. The defendant has the onus of proving that he is the beneficial owner and the plaintiff the alleged trustee. In my considered opinion the defendant has not met the threshold of having made full settlement of the purchase price. Here it was the plaintiff alone who had entered into the share sale agreement with the previous vendors on 28 January 2016. The defendant was not a party to the share sale agreement. All he had to show was his promise to pay the acquisition cost in equal share in the future. I am in complete agreement with the plaintiff that a mere promise to pay later does not amount to immediate beneficial ownership in those shares. At best the defendant is a promisee of the shares reserved for him subject to his actual payment of the locked in price as promised by the plaintiff.

[10] In summary, the learned High Court judge opined, among others, that the appellant could not benefit from half of the dividends of the 500,000 shares because the appellant had yet to acquire the right of the said share (250,000 shares) since he had not paid in full the 50% of the acquisition costs of the 500,000 shares. As such, the respondent could not be holding on trust the said shares for the benefit of the appellant.

[11] Consequently, the learned High Court judge did not accept that the parties had agreed to the mode of payment of the appellant's said shares by way of offsetting the purchase price with the declared dividends.

[12] In conclusion, the learned High Court judge found there was no trust created over the 250,000 shares for the benefit of the appellant. At best, it was merely a promise made by the appellant to the respondent that the appellant will pay the respondent in the future for the said shares, and that the respondent was to reserve the 250,000 shares for the appellant until the appellant paid in full his portion of the acquisition costs for the said shares, only then the respondent would transfer the said shares to the appellant. Upon the transfer, only then the appellant would be entitled to enjoy and benefit from the dividends from the said shares.

THE FINDINGS OF THIS COURT

Private express trust

[13] It is trite law that to create a private express trust three certainties must be present, namely, certainty of intention, certainty of subject matter and certainty of object(s), ie, the beneficiary(ies). How the trustee is to manage, control and/or deal with the trust property entirely depends on the terms as provided in the deed. The trustee's duties, responsibilities and powers are governed by the Trustee Act 1949 (Revised 1978) (Act 208) and the common law.

[14] In the present case, reading from the plain language and wording of the trust deed, there is no vagueness or ambiguity that the three certainties are conspicuously present. Certainty of intention of the parties could be found from the plain language expressed at the recital in para (C), wherein it stated that the 250,000 shares beneficially belonged to the appellant, and that the respondent was to hold the said shares and 'all the rights, title and benefits thereto on trust' for the appellant. Another part of the trust deed that expresses the parties' certainty of intention to create a trust is found in para 1 which is reproduced as below:

> 1. The trustee hereby irrevocably declares and confirms that as from the date the trustee acquired the trust shares, it has been holding and shall continue to hold the trust shares with all rights, title and benefits thereto as trustee, not for its own benefits, but upon trust for the sole and absolute benefit of the beneficiary ...

[15] There could be no better way to express the parties' intention to create a trust from the above wordings. The words used are unequivocal, explicit and unreserved.

[16] With regard to certainty of subject matter and certainty of object, the above paragraph is crystal clear that the subject matter of the trust was the 250,000 shares and the object, viz the beneficiary, was the appellant. Hence, the fundamental elements of creating a private express trust are clearly present and easily identifiable in the deed.

High Court applied the legal principle of an implied trust

[17] This court finds the learned High Court judge failed to discuss and identify the fundamental elements of a private express trust in her grounds. Beneficial ownership in a private express trust could be created and take immediate effect upon a clear declaration expressed in writing, and provided that the three certainties are found to be present in the deed. In para 1 of the trust deed, the respondent had unequivocally declared and confirmed that it was holding the 250,000 shares on trust the moment it acquired the said shares. The 500,000 shares were legally transferred to and registered in the name of the respondent on 11 April 2016.

[18] The learned High Court judge made an error of applying the principle of law of an implied trust and in holding that 'a party can only be said to be a beneficial owner if he has made full settlement of the purchase price' (see para 76 of Her Ladyship's judgment). Her Ladyship found support for her finding by relying on the Federal Court decision in *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193.

[19] In *Tan Ong Ban*, the facts pertain to a sale and purchase of a property where the purchaser had paid in full the purchase price for the property to the vendor, but there was no effective transfer of legal ownership of the said property from the vendor to the purchaser. In this circumstance, the vendor became a bare trustee for the purchaser and the purchaser assumed the position of the beneficial owner. The creation of a trust in this circumstance is by implication, or more commonly known as implied trust, as opposed to the present case which involves a private express trust. The apex court imposed an implied trust to prevent injustice in the circumstances in which it was necessary for an inference to be drawn from the fact that the vendor could not unjustly enrich himself by not transferring the legal ownership of the property upon receipt of the full purchase price from the purchaser of the sale property. Contractually, the parties had intended the property to be transferred upon full settlement of the purchase price.

[20] In the instant case, although full ownership would be transferred to the appellant upon full settlement of the agreed acquisition costs, it was not the intention of the parties from the outset that the respondent was to sell the said shares to the appellant. Instead, it was agreed that the respondent would acquire the 500,000 shares and would hold 250,000 shares out of the 500,000 shares on behalf of and on trust for the appellant. Therefore, the assumption of beneficial ownership of the said shares was immediate and not upon condition that the appellant paid in full his part of the acquisition costs.

[21] This is a private express trust created by expressed intention and in writing, as opposed to an implied trust created by inference drawn from the facts between parties in an agreement, like a sale and purchase agreement. Therefore, the learned High Court judge had erred in applying the legal principle of an implied trust enunciated in *Tan Ong Ban* to the present case.

The entitlement to the dividends

[22] In the course of the proceedings this court posed a question to the parties 'Whether could a trust be created over a deferred right? If yes. When would it take effect?'. The 'deferred right' is in reference to the legal ownership of the said shares. In so far as this issue is concerned, this court is of the considered view that in a situation of a private express trust, a settlor, upon

having acquired the full legal ownership of a property, is entitled in law to make a declaration that he/she holds the said property on trust, and to name the beneficiary of his/her choice. If there is a condition for the legal ownership to be transferred to the named beneficiary, that condition could not prevent or hinder the creation of a private express trust. That condition in the private express trust only goes to the effect of transfer of legal ownership.

[23] In the present case, it is not in dispute that the appellant has to pay his part of the shared acquisition costs to the respondent, and that was the condition set down in the trust in order for the trust property to be transferred to the appellant. As mentioned earlier, the learned High Court judge applied the wrong principle of law on implied trust to a private express trust, which led the High Court judge to the conclusion that there could be no trust until the appellant had paid up his share of the acquisition costs. For that reason, the learned High Court judge had erred in conflating the condition set out in the trust deed for the transfer of the trust property with the law for the creation of an implied trust. They are entirely distinct creatures.

[24] Based on the above analysis, the first part of the question is answered in the affirmative. Then the next question is when the trust takes effect? The trust ought to have taken effect, in the opinion of this court, immediately upon the declaration being made by the respondent which was on 11 April 2016 because the wording of the trust deed stated 'the trustee hereby irrevocably declares and confirms that as from the date the trustee acquired the trust shares, it has been holding and shall continue to hold the trust shares'.

[25] Further, in para 4 of the trust deed, the appellant was entitled to nominate a representative to be appointed as a director to represent his interest in the company. Thus, the appellant's right(s) as a beneficiary to the said shares took effect immediately upon execution of the trust deed. Equally, the appellant was responsible to indemnify and keep the respondent fully indemnified against all damages, claims, costs and expenses in connection with the intended shareholders agreement to be executed by the respondent who would be representing the 500,000 shares of the company. Clearly, para 4 had set out the appellant's right and liability toward his said shares upon the execution of the trust deed.

[26] Flowing from the above finding to the question posed by the court, the next pertinent consideration is whether the appellant was immediately entitled to the dividends to the said shares which were declared by the company. In other words, did the respondent also hold on trust the dividends to the said shares for the benefit of the appellant? This court is of the considered view that the respondent not only agreed to hold the said shares on trust, but also agreed to hold the said shares and continue to hold the said shares 'with all rights, title

A and benefits thereto as trustee, not for its own benefits, but upon trust for the sole and absolute benefit of the beneficiary'.

B **[27]** It is clear from the wording of the trust deed that the respondent would not take the rights, title and benefits to the said shares for its own entitlement or enjoyment, but would hold them on trust for the absolute benefit of the appellant. The rights, title and benefits surely must have included any dividend declared by the company. Therefore, it follows that the respondent not only held the said shares on trust for the appellant, but also held the declared dividends to the company's shares on trust for the benefit of the appellant the C moment the private express trust took effect.

Dealings with the dividends

D **[28]** The trust deed was silent as to whether and how the respondent may deal with the dividends received from the company's 500,000 shares. As alluded above, 50% of the dividends from the 500,000 shares belonged to the appellant and the respondent was merely holding the said dividends on trust for the appellant. There was no special or implied power given to the E respondent as a trustee to deal with the said shares other than as provided for expressly in para 3 which stated that the respondent shall cause the said shares to be transferred to the appellant and/or his nominee as and when requested to do so provided that the appellant had paid in full all liabilities attributed to the said shares by the respondent.

F **[29]** With regard to the dealing of the dividends, there was no instruction given to the respondent how to deal with them. The only part in the trust deed that has some relevance to the dealing of the dividends is where it stated 'all rights, title and benefits thereto as trustee, not for its own benefits, but upon G trust for the sole and absolute benefit' of the appellant.

[30] Therefore, the respondent had the onus to ensure any dealing with the dividends has to be for the sole and absolute benefit of the appellant. Insofar as the first interim dividend received on 6 June 2016, the respondent had used it H to offset part of the shared acquisition costs of the appellant's portion. Therefore, the dealing of the first interim dividend was indeed for the sole and absolute benefit of the appellant.

Whether there was an agreement to offset the acquisition costs?

I **[31]** The next question is whether there was an agreement to offset the acquisition costs with the dividends received? From the outset, the appellant averred that there was an understanding between the parties that the appellant would use his entitlement of the dividends to offset the sum which he owed for

the acquisition costs. However, the respondent contended that there was no such agreement between the parties. This court finds this contention is no longer relevant for determination because this court finds that the appellant was entitled to the benefit of his shares including the dividends received. The dividends which the appellant was entitled to amounted to RM6.75m. As such, the said RM6.75m could be used to offset the appellant's portion of the shared acquisition costs because the purpose of offsetting the shared acquisition costs was for the absolute benefit of the appellant as a beneficiary of the said shares.

The demand for repayment of the acquisition costs by the respondent

[32] As discussed above, a private express trust had been created through the execution of the trust deed by the parties. The trust deed had also laid down the condition when the trust property, ie, the said shares, could be transferred to the appellant, the beneficiary. It also provided the trustee, the respondent, the right to demand for the repayment of the acquisition costs from the beneficiary. This is expressly provided in para 2 of the trust deed which stated that the appellant 'shall upon a request or demand being made' by the respondent, promptly and immediately contribute his portion of liabilities towards payment of the acquisition costs and financing obligations associated with the said shares.

[33] The respondent made its first demand on 15 May 2020 to the appellant for settlement of the balance of the acquisition costs. A second notice of demand was issued via the respondent's solicitors to the appellant on 27 August 2020. This court is of the considered view that the respondent was entitled under the terms of the trust deed to demand for repayment of the balance of the shared acquisition costs, but the repayment sum at that material time would depend on the parties' interests and rights. On 27 August 2020, the amount demanded was not the final balance outstanding sum for the shared acquisition costs because the loan was still subsisting and chargeable interests were still running until the full loan sum was finally paid off on 3 January 2022. It was until 3 January 2022, the respondent would be able to determine the actual final shared acquisition costs of the 500,000 shares.

[34] This court is of the considered view that the respondent was wearing two hats at the same time in the trust deed, one as a trustee, and the other as a creditor. Insofar as the obligation as a trustee was concerned, the respondent was responsible to ensure the dealings of the trust property and the rights, title and benefits thereto would go the absolute benefit of the appellant. With regard to the position as a creditor, the respondent had the right to demand from the appellant for the repayment of the balance outstanding acquisition costs as envisaged in para 2 of the trust deed.

[35] The right to demand for repayment was a right of the respondent as a creditor, not as a trustee. Upon a demand made for the repayment of the acquisition costs by the respondent (as a creditor) to the appellant (as a debtor), the repayment must necessarily be immediate. Therefore, the appellant could not postpone his obligation to pay the respondent by insisting using any future dividends to offset his immediate outstanding debt to the respondent. However, this issue has become academic because the respondent's loan had been paid off on 3 January 2022 and the final shared acquisition costs could be determined. If there was a final sum due and payable, it had to be on 3 January 2022.

The upshot of the above findings

[36] This court has tabulated the remaining acquisition costs that the appellant is liable to pay the respondent as below:

Items	Amount
Costs of the 500,000 shares	RM18.75m
Miscellaneous expenses incidental to the acquisition	RM7,075.47 RM101,125.20 RM567.55 RM81,500 RM20,000
Chargeable interest by the bank (from 21 April 2016 to 3 January 2022)	RM2,666,775.14
Total acquisition costs	RM21,627,043.36

The total acquisition costs RM21,627,043.36 to be shared 50:50	RM10,813,521.68
Less initial payments made by the appellant	(RM500,000)
Less appellant's entitlement to half of the dividends received as at 22 June 2022 (total dividend received RM13.5m)	(RM6.75m)
Appellant owed (as at 22 June 2022) and is still owing the respondent	RM3,563,521.68

[37] The above tabulation is calculated until the full repayment of the principal sum and chargeable interest owing to the bank which ended on 3 January 2022 and also having considered the last dividend received on 22 June 2022.

[38] This court is of the considered view that after having considered the available dividends used to offset the remaining outstanding acquisition costs

and the earlier payment made by the appellant, ie, the sum of RM500,000, the appellant owed (as at 22 June 2022) and is still owing the respondent the sum of RM3,563,521.68.

[39] The appellant averred that he only owed RM2,284,343.60 as the balance acquisition costs as at 28 February 2023 according to the tabulation in Appendix B of encl 30 — *hujahan bertulis perayu*. The said sum of RM2,284,343.60 is derived from after having included chargeable interest of 5% amounting to the sum of RM1,279,178.08* which was purportedly owed to the appellant by the respondent (RM3,563,521.68 less RM1,279,178.08 = RM2,284,343.60).

[40] This court could not agree with the appellant that the respondent could be liable for the chargeable interest of 5% calculated on the dividends declared (the portion of the appellant), because the declared dividends ought to have immediately offset whatever remaining outstanding balance of the acquisition costs at that material which the respondent was entitled to demand from the appellant. Therefore, the judgment to be entered against the appellant for the sum owing to the respondent as the balance outstanding acquisition costs which is to be paid by the appellant is RM3,563,521.68.

(**Note*: The court computed the interest allegedly chargeable in appendix B to be in an amount of RM1,287,397.31, a difference of RM8,219.23. However, this is irrelevant as the chargeable interest is not allowed by this court.)

Summary of this court's findings

[41] In summary, this court finds the learned High Court has erred in law in applying the principle of implied trust in the present case in circumstance where the parties in the trust deed had in fact and in law created a private express trust. The requisite elements for creating an express trust, namely certainty of intention, certainty of subject matter and certainty of object were all found to be present in the said trust deed. Therefore, the trust took effect immediately upon the execution of the trust deed on 11 April 2016.

[42] The respondent, being the trustee, not only held the trust property on trust for the benefit of the appellant, it also held the rights, title and benefits that derived from the trust property on trust. Therefore, the dividends derived from the trust property from time to time ought to be held on trust for the absolute benefit of the appellant.

[43] Any dealing with the dividends must be to the benefit of the appellant. The dividends could be used to offset the acquisition costs of which the appellant had agreed to pay because such offsetting is for the absolute benefit of the appellant.

[44] The respondent, other than being a trustee of the trust, was also a creditor to the appellant. The parties in the trust deed agreed that the respondent could demand that the appellant pay his portion of the liabilities towards payment of the acquisition costs and financing obligations associated with the trust property (the said shares). Therefore, the respondent was entitled to do so at anytime despite the finding of this court that the dividends could be used to offset the appellant's portion of the acquisition costs. There was no agreement that the repayment of the appellant's portion of the acquisition costs could be deferred to as and when dividends were received from time to time. However, that right to demand has become academic as explained above.

[45] This court, after having examined the evidence of the trial court, finds the appellant indeed still owes the respondent the sum of RM3,563,521.68 as the appellant's portion of the final balance outstanding amount of the acquisition costs. Further, this court is of the considered view that the appellant could not impose on the respondent chargeable interest on the dividends received because the dividends received would have been used immediately to offset the appellant's shared acquisition costs at that material time.

CONCLUSION

[46] For the reasons as stated above, we hold that the learned judge of the High Court was plainly wrong in arriving at her decision and appellate intervention is warranted. As such, this court hereby makes the following orders:

(a) the appeal is allowed;

(b) the High Court's order dated 28 October 2022 is hereby set aside. Consequently, the respondent's claim (the plaintiff's claim) is dismissed, and the appellant's counterclaim (the defendant's counterclaim) is allowed, and the orders are as follows:

(i) the appellant is to pay the respondent the sum of RM3,563,521.68 (as at 22 June 2022) as his portion of the contribution for the final outstanding balance sum of the acquisition costs for the 250,000 shares of the company Sekoplas Industries Sdn Bhd within one month from the date of this order;

(ii) the appellant is liable to pay interest chargeable at 5%pa on the said judgment sum to be calculated from the date 22 June 2022 until to the date of full settlement; and

(iii) the sum of RM12,485,514.32 (together with interest earned) which is currently held by the firm of solicitors Messrs Leong Yeng Kit & Co (solicitors for the respondent) as stakeholder shall be released to the appellant after deduction is made for the payments

in paras (a) and above within one month from the date of this order. The sums deducted in paras (a) and (b) shall forthwith be released to the respondent by the said solicitors;

(c) we order costs of RM50,000 (subject to allocator) to be paid to the appellant as costs here and below.

Appeal allowed; High Court's decision set aside. The appellant to pay the sum of RM3,563,521.68 (as at 22 June 2022) to the respondent within one month together with interest thereon at 5%pa from that date until date of full settlement, being the balance amount owed for acquisition of the trust shares.

Reported by Ashok Kumar